

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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4 IN RE: CAPRIATI CONSTRUCTION
5 CORP, INC.,

6 Debtor.

Case No. 2:16-cv-01560-APG

OPINION

7 SEQUOIA ELECTRIC
8 UNDERGROUND, LLC,

9 Appellant,

10 v.

11 CAPRIATI CONSTRUCTION CORP, INC.,
12 *et al.*,

13 Appellants.

14 Sequoia Electric Underground, LLC appeals from the bankruptcy court's order granting a
15 stipulation entered into among debtor Capriati Construction Corp, Inc.; the Nevada Department of
16 Taxation (NVTax); and the Nevada Department of Transportation (NDOT). ECF No. 1. That
17 stipulation resolved (1) proofs of claim NVTax and NDOT filed against Capriati's estate and (2)
18 the distribution of funds NDOT owed to Capriati under a construction contract. In a nutshell,
19 Sequoia contends the stipulation improperly distributes funds that do not belong to Capriati's
20 estate because Capriati breached the underlying contract and thus no longer was entitled to the
21 funds in NDOT's possession.

22 Capriati responds that Sequoia did not object to the stipulation before the bankruptcy court
23 and thus Sequoia cannot raise this issue for the first time on appeal. Capriati also contends the
24 bankruptcy court's order was not final and appealable. Finally, Capriati, NVTax, and NDOT
25 respond that under Nevada law Capriati had an interest in the funds; thus, the funds properly were
26 treated as property of the estate that must be returned to Capriati.

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1 Sequoia did not raise any of its arguments before the bankruptcy court. A party cannot
2 raise issues for the first time on appeal absent various exceptions. None of those exceptions
3 applies in this case. I therefore dismiss this appeal, without prejudice to Sequoia attempting to
4 obtain relief before the bankruptcy court.

5 **I. BACKGROUND**

6 Capriati was a general contractor on the US 95 highway project under contract 3409 with
7 NDOT (Project 3409). ECF No. 16 at 8-9. Sequoia was a subcontractor to Capriati on Project
8 3409. ECF No. 9 at 40-61. Capriati obtained performance and payment bonds for the project
9 from Fidelity and Deposit Company of Maryland. *Id.* at 11-18; ECF No. 16 at 10-17; *see also*
10 Nev. Rev. Stat. § 408.357 (requiring bidders on highway projects to furnish performance and
11 payment bonds).¹

12 On March 12, 2014, NDOT advised Capriati that NDOT had inspected Capriati's work on
13 Project 3409 and "all items have been found to be satisfactorily completed in accordance with the
14 Construction Plans, Specifications and Special Provisions." ECF No. 14 at 4. NDOT further
15 stated that the "contract was completed December 1, 2012, and is hereby accepted by the Nevada
16 Department of Transportation, as of March 7, 2014." *Id.* As required by Nevada law, NDOT
17 published a notice to creditors in the newspaper "[p]ursuant to NRS 408.387" advising them that
18 the project was completed and any claims on the contract must be submitted to NDOT within 30
19 days. ECF No. 16 at 32-33; *see also* Nev. Rev. Stat. § 408.363(1) (requiring persons furnishing
20 materials or labor to the general contractor to make a claim on the contractor's bond within 30
21 days from the date NDOT finally accepts the contract); *id.* § 408.387 (requiring NDOT to publish
22 a notice of the date of final acceptance).

23 Capriati did not pay Sequoia amounts due for Sequoia's work on Project 3409, so Sequoia
24 sued in Nevada state court. ECF No. 9 at 62; *see also* Nev. Rev. Stat. § 408.363(2) (providing that
25 persons furnishing materials or labor to contractor may file suit against the surety six months after
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27 ¹ Sequoia apparently disputes which chapter of the Nevada Revised Statutes applies. For purposes
28 of providing a factual context to the dispute, I cite to Chapter 408.

1 they file a claim with NDOT). That litigation resulted in two partial summary judgments holding
2 that Capriati breached the subcontract and owed Sequoia \$349,125.08 and \$253,655.29,
3 respectively. ECF No. 9 at 62-81. Sequoia contends it is still due funds, including attorney's fees
4 and amounts due under Change Order 15, which involved the resetting of high mast poles. ECF
5 No. 16 at 22-30.

6 Capriati filed for chapter 11 bankruptcy protection but did not identify Sequoia or the state
7 court litigation in its schedules. ECF Nos. 6 at 46-54; 7 at 4-80, 85-86. Fidelity filed a proof of a
8 secured claim based on payments it made on the payment bond, including the second Sequoia
9 partial summary judgment award. ECF No. 9 at 4-18, 27 (identifying \$972,411.88 in losses
10 related to "US 95"), and 31 (identifying \$270,804.51 for Sequoia and \$7,946.07 in related
11 interest). Sequoia filed a proof of claim in the amount of \$392,575.98. *Id.* at 34-39.

12 NVTax filed proof of claim 19 in the amount of \$47,854.85. ECF Nos. 8 at 31; 16 at 34-
13 35. NDOT filed several separate proofs of claim. NDOT filed claim 44 for \$5,500 for taxes or
14 penalties owed based on a final decision by the Nevada State Labor Commissioner. ECF No. 16
15 at 36-52. NDOT indicated this claim was subject to a right of setoff based on "[r]etainage under
16 NDOT Contract No. 3409." *Id.* at 37. NDOT also filed claims 73 through 78 for back wages and
17 related penalties. *Id.* at 54-130. Like claim 44, each of these claims stated that they may be
18 subject to setoff by "retainage" under the Project 3409 contract. *Id.* at 55, 66, 77, 94, 111, 122.

19 The "retainage" arises from Nevada law, which requires NDOT to make progress
20 payments for no more than ninety-five percent of the entire contract price. Nev. Rev. Stat.
21 § 408.383(1). "The remaining 5 percent, but not more than \$50,000, must be retained until the
22 entire contract is completed satisfactorily and accepted by the Director." *Id.*

23 On June 10, 2016, Capriati entered into a stipulation with NDOT and NVTax to accept
24 unpaid funds NDOT owed to Capriati on Project 3409, including the \$50,000 retainage, and apply
25 them to claims 19, 44, and 73 through 78. ECF Nos. 6 at 25; 8 at 92-95. That stipulation states
26 that "NDOT currently holds a retention under Contract No. 3409 in the sum of \$50,000.00 and
27 the sum of \$182,746.30 for quantities not yet paid to date under Contract No. 3409 for a total
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1 amount retained of \$232,746.30.” ECF No. 8 at 92. The stipulation provides that the funds will
2 be applied as follows: (1) \$15,777.46 of the retention fund to be held in trust by NDOT pending a
3 final decision by the Labor Commissioner; (2) \$36,014.18 of the retention fund to be held by
4 NDOT to be paid to NVTax on its priority claim upon plan confirmation, with NVTax’s
5 unsecured claim to be treated under the plan; (3) \$5,500 of the retention fund to be paid to NDOT
6 upon plan confirmation; and (4) all remaining amounts remitted to Capriati upon confirmation. *Id.*
7 at 94-95. The bankruptcy court approved the stipulation four days later. ECF Nos. 6 at 25-26; 8
8 at 97-98.

9 Sequoia did not object to the stipulation, but now appeals the bankruptcy court’s approval
10 of it. Sequoia argues that the amounts in the retention fund and the remaining \$182,746.30 were
11 not property of the estate, and thus the parties could not stipulate to the distribution of those funds
12 through Capriati’s bankruptcy proceeding. Sequoia contends Capriati had no interest in those
13 funds because it had breached the general contract by not paying its subcontractors. Sequoia thus
14 reasons that NDOT had no obligation to pay Capriati those funds, so the funds never became
15 estate property. Rather, Sequoia argues, because Fidelity paid out on its payment bond, Fidelity
16 was entitled to the funds remaining on the Project 3409 contract. Alternatively, Sequoia argues
17 that because the remaining unpaid funds represent Sequoia’s work on Change Order 15, the funds
18 belong to Sequoia. Sequoia also objects to the balance of any remaining funds being distributed
19 to Capriati without any protection of the surety, Fidelity.

20 Capriati responds that Sequoia’s appeal is barred because it failed to object to the
21 stipulation. Capriati also contends that the bankruptcy court’s order granting the stipulation is an
22 interlocutory order for which Sequoia did not obtain leave to appeal. On the merits, Capriati
23 argues that NDOT has never found Capriati in breach of the contract and Sequoia has no standing
24 to assert a breach of a contract to which it is not a party. Capriati also argues that under Nevada
25 law, a subcontractor on a highway project does not have an equitable lien on monies held by
26 NDOT. Rather, Capriati contends, the subcontractor’s only remedy is to make a claim on the
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1 payment bond. Finally, Capriati claims that Sequoia's appeal is frivolous and therefore the court
2 should award Capriati its fees and costs for having to respond.

3 NVTax and NDOT separately respond that under Nevada law and the applicable contract,
4 the balance owed on the contract and the retention must be released to the contractor, not to
5 subcontractors or the contractor's surety. They thus contend that Capriati had at least an
6 equitable interest in the funds at the time it filed for bankruptcy, so the funds are property of the
7 estate. NVTax and NDOT also contend Sequoia lacks standing to argue that Fidelity ought to
8 have an equitable lien on the retainage and unpaid contract amounts.

9 Sequoia replies that requiring it to object to a proposed stipulation within four days (but
10 only two business days) is unreasonable, and therefore its appeal should not be dismissed on the
11 basis that it failed to object below. Sequoia also contends that the order is not interlocutory
12 because it finally determines Capriati's right to the retention fund and the unpaid balance on the
13 contract. On the merits, Sequoia argues that because Capriati breached the general contract by
14 failing to pay its subcontractors, Fidelity had to step in and pay and, as a result, Capriati no longer
15 has a claim to the funds. Instead, Sequoia argues, the bankruptcy court should have ordered those
16 funds be paid to Fidelity or placed into escrow. Sequoia also contends that the bankruptcy court
17 lacked the factual detail that is being provided here, and thus it had no evidentiary basis to make
18 its ruling.

19 **II. ANALYSIS**

20 "As a general rule, issues 'not presented to the trial court cannot generally be raised for
21 the first time on appeal.'" *In re Enewally*, 368 F.3d 1165, 1173 (9th Cir. 2004) (quoting *United*
22 *States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991)). This rule applies to situations where
23 a party fails to raise issues before the bankruptcy court. *Id.* There are several exceptions to this
24 general rule: "(1) there are exceptional circumstances, (2) the new issue arises while the appeal is
25 pending because of a change in the law, . . . (3) the issue presented is purely one of law and the
26 opposing party will suffer no prejudice as a result of the failure to raise the issue below," and (4)
27 "the trial court's decision was plain error and injustice would otherwise result." *Id.*
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1 Here, the bankruptcy court granted the stipulation within four days of the parties
2 submitting it. Sequoia did not object before the court granted the stipulation, but that is hardly
3 surprising given how quickly the court acted. However, Sequoia thereafter did not file with the
4 bankruptcy court a motion for reconsideration or some other relief advising that Sequoia objected
5 to the stipulation and the grounds for its objection. Instead, Sequoia filed this appeal. Because
6 Sequoia did not first raise these issues before the bankruptcy court, it cannot do so for the first
7 time in this appeal.

8 No exception warrants departure from the general rule that issues cannot be raised for the
9 first time on appeal. Sequoia argues there are exceptional circumstances because there was
10 insufficient time to respond to the stipulation before it was approved. But nothing prevented
11 Sequoia from filing a motion with the bankruptcy court after the stipulation was granted.

12 The issues on appeal are not purely questions of law—the surrounding factual context is
13 both disputed and not fully developed. Indeed, Sequoia admits in its reply brief that “[c]ontrary
14 to NDOT and NVTAX’s claims, this matter is far from fully briefed to the Court” and that many
15 pertinent facts were never provided to the bankruptcy court. ECF No. 23 at 12. Nor has Sequoia
16 shown that the opposing parties will suffer no prejudice by its failure to first present these issues
17 to the bankruptcy court, which could consider the parties’ arguments on a full factual record and
18 in the context of the overall bankruptcy proceeding.

19 Finally, the parties’ appellate briefs do not show plain error. Nor does Sequoia show an
20 injustice because it could and should have first raised these issues before the bankruptcy court.

21 I dismiss Sequoia’s appeal because it raises numerous issues that were never presented to
22 the bankruptcy court. I do so without prejudice to Sequoia attempting to obtain relief in the
23 bankruptcy court. I deny Capriati’s request for attorney’s fees and costs because there was no
24 request by separate motion. Fed. R. Bankr. P. 8020(a) (“If the district court or BAP determines
25 that an appeal is frivolous, it may, after a separately filed motion or notice from the court and
26 reasonable opportunity to respond, award just damages and single or double costs to the
27 appellee.”); *In re Kyle*, 317 B.R. 390, 395 (B.A.P. 9th Cir. 2004) (“To the extent Federal Rule of
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1 Bankruptcy Procedure 8020 applies, the requests are rejected as not being in ‘a separately filed
2 motion’ as required by that rule.”).

3 **III. CONCLUSION**

4 IT IS THEREFORE ORDERED that appellant Sequoia Electric Underground, LLC’s
5 appeal is DISMISSED without prejudice to Sequoia attempting to obtain relief before the
6 bankruptcy court. The clerk of court is instructed to close this case.

7 DATED this 31st day of March, 2017.

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10 ANDREW P. GORDON
11 UNITED STATES DISTRICT JUDGE
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